

Hon. William J. O’Neil, Bar No. 005571
Presiding Disciplinary Judge
Arizona Supreme Court
1501 West Washington, Suite 102
Phoenix, AZ. 85007-3231
Telephone: (602) 452-3436
Facsimile: (602) 452-3498
Email: officepdj@courts.az.gov

IN THE SUPREME COURT OF ARIZONA

In the Matter Of)	No.
)	
RULE 61, RULES OF THE)	PETITION TO AMEND
SUPREME COURT OF ARIZONA)	RULE 61, <i>RULES OF THE</i>
)	<i>ARIZONA SUPREME COURT</i>
)	
)	
)	
)	
)	

Pursuant to Rule 28, Rules of the Supreme Court, the Honorable William J. O’Neil, Presiding Disciplinary Judge of the Supreme Court of Arizona, petitions the court to amend the *Rules of the Supreme Court of Arizona* as reflected in the accompanying Appendix A.

I. INTRODUCTION

Effective January 1, 2011, this Court adopted changes to the attorney discipline system, including the establishment of the Office of the Presiding Disciplinary Judge. The Presiding Disciplinary Judge (PDJ) presides over attorney discipline and disability proceedings, and also issues orders and opinions as part of a three member hearing panel. These orders and opinions are typically final orders that may be appealed to this Court.

Rule 61 outlines the procedure for interim suspension. Minor modifications to this rule occurred as part of the establishment of the Office of the Presiding Disciplinary Judge. Presently the rule authorizes the PDJ to “issue an order in the nature of a temporary restraining order, with such notice as the judge may prescribe, imposing temporary conditions of probation on the lawyer, or temporarily

suspending the lawyer, or both.” Rule 61(c)(2)(A). The rule offers little procedural guidance for an emergent process that holds an enormous potential for the protection of the public and profession, while simultaneously holding enormous potential for practical harm to the attorney. The proposed rule better outlines this important process.

Attorney discipline and disability proceedings are *sui generis* or unique unto itself. See Rule 48 of the Rules of the Supreme Court. As a result the Office of the Presiding Disciplinary Judge is primarily guided by the disciplinary rules set forth within the Rules of the Arizona Supreme Court or other rules incorporated into those rules (See Rule 47) and case law. Clarity and direction for this process are critical. The interest of the public and the profession would be served by amending this rule expeditiously.

II. SUMMARY OF THE PROPOSED AMENDMENT

The proposed amendments to this rule better define the terms of interim suspension and the temporary restraining power of the PDJ. This Court is the sole body with the power of interim suspension. As a result, the temporary order of the PDJ is re-defined as “immediate suspension” differentiating the orders of this Court and the PDJ. Interim suspension and immediate suspension are collectively defined as “Temporary Suspension”. In a discipline system intended to be more transparent to the public, such terminology gives greater clarity to the nature of these orders.

The amendment sets forth a more explicit procedure for the state bar when it seeks emergent relief. An order to show cause procedure is proposed that more closely follows the process outlined in the Arizona Rules of Civil Procedure. The requirement of notice is better defined. The extraordinary instances when orders might be required without notice mirrors the civil rule requirements. The amendment recommends that hearings on these important petitions be mandatory regardless of whether the respondent attorney answers or appears. Findings of fact and conclusions of law are mandated regardless of whether relief is granted to better aid this Court’s review.

The order of the PDJ is designed to be temporary, yet at the same time holds the possibility of the Court granting an interim suspension that may be in place for up to five years. See Rule 61(b). Interim relief by definition is to cover the time intervening between the temporary suspension, the filing of a complaint, and its adjudication or resolution. Because the relief sought is significant yet temporary, the amendment requires the PDJ to weigh the status of the investigation by the state bar of the alleged conduct described within the petition. The PDJ would be required to balance delay in filing of the complaint as a factor in considering whether to issue relief. This better protects the attorney while offering less vagueness to the process for the profession and the public we serve.

The amendment establishes a more reasonable baseline expectation for the consequences of a temporary restraining order by the PDJ while retaining flexibility for the extraordinary event. Unless substantial good cause is shown, any temporary order of immediate suspension would preclude the acceptance of new cases by the respondent attorney but allow the continued representation of existing clients pending final order of this Court. Because of the temporary nature of the order, absent showing substantial good cause the attorney would not be required to notify his existing clients or the courts of such immediate suspension by the PDJ. In addition the amendments better define the process for the review by this Court of the rulings of the PDJ on these important petitions.

III. REQUESTED TIME LINE FOR COMMENT AND REFERRAL TO A.R.C.

It is requested that initial comments be received by April 1, 2012 and final comments in June 2012. It is further recommended that this petition be referred to the Attorney Regulation Advisory Committee (ARC) for its consideration, comments and recommendations. ARC was created in accordance with Administrative Order No. 2011-44, to assist the Supreme Court and the Chief Justice on issues relating to attorney regulation. ARC monitors the implementation of this new discipline process, is charged to review periodically the entire attorney admission and discipline system and to make recommendations for any needed changes.

IV. CONCLUSION

The approval of this procedural amendment offers clarity, greater consistency, and procedural guidance to the temporary suspension process. It is offered with the intent to better protect the public we serve, the profession and the respondent attorneys who appear before the PDJ. This proposed amendment will better assure all involved of an effective, uniform and timely resolution of temporary suspension requests.

DATED this 10th day of January 2012.

William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona

ORIGINAL ELECTRONICALLY filed
with the Clerk of the Arizona Supreme Court
this 10th day of January, 2012:

APPENDIX A

Rule 61. ~~Interim Suspension by the Court~~ Temporary Suspension or Restraining Order

(a) Temporary Suspension. Temporary suspension is the interim or immediate suspension of a lawyer's license to practice law for a definite or indefinite period of time while proceedings conducted pursuant to this Rule or these Rules are pending against the lawyer.

(b) Temporary Restraining Order. Temporary restraining order is the imposition of temporary conditions of probation on the lawyer or immediate suspension of a lawyer or both by the presiding disciplinary judge pursuant to this rule.

(c) Grounds for ~~Interim~~ Temporary Suspension. ~~An interim~~ A temporary suspension may be entered upon a showing ~~that a lawyer appears to be misappropriating funds, engaging in conduct the continuation of which will result in substantial harm, loss or damage to the public, the legal profession or the administration of justice, has been convicted of a misdemeanor involving a serious crime or a felony, as defined in Rule 54(g), or is subject to another ground stated in these rules.~~ of reasonable cause to believe that the lawyer has been convicted of any felony or a misdemeanor involving a serious crime as defined in Rule 54(g) or is causing or has caused immediate and substantial public or private harm and appears to have engaged or is engaging in any of the following conduct:

1. Misappropriation of funds or property;
2. Abandonment of multiple clients;
3. Conduct which poses an immediate threat to the effective administration of justice or the legal profession.

(d) Period of Interim Suspension. A lawyer may be temporarily suspended from the practice of law for an indeterminate ~~interim~~ period not in excess of five (5) years pending further order of this court.

(e) Procedure for Interim Suspension by the Court upon Conviction of a Crime

1. Upon Conviction of a Crime. Upon conviction of a lawyer of any crime, the clerk of the court in which the conviction is entered shall, within twenty (20) days thereafter, transmit to this court and to the state bar a certified copy of the judgment of conviction, and the convicted lawyer shall, within twenty (20) days after entry of judgment of conviction of a misdemeanor involving a serious crime or of any felony, provide the following information to chief bar counsel: (a) name, bar number and address of record with the state bar, and a current address if different from the address of record; (b) the name of the court in which the judgment of conviction was entered; (c) the case or file number in which the judgment of conviction was entered; and (d) the date the judgment of conviction was entered.

A. Felony Conviction: A lawyer shall be suspended after the court's receipt of proof of the lawyer's conviction of a felony under either state or federal law, regardless of the pendency of post conviction motions or an appeal, unless within ten (10) days of the clerk's receipt of proof of the conviction the member files with the court a verified motion showing good cause why the suspension should

not be entered. The court may permit the lawyer to present oral argument in support of the lawyer's motion and shall promptly grant or deny it. If the motion is denied, the lawyer shall be suspended as of the date the motion is denied. If the motion is granted, the lawyer shall not be suspended pending completion of a disciplinary proceeding based on such conviction.

B. *Serious Misdemeanor Conviction*: A lawyer convicted of a serious crime other than a felony may be suspended, upon motion of the state bar, pending final disposition of a disciplinary proceeding predicated upon the conviction. Within ten (10) days of the state bar filing a motion, respondent may file with this court a verified response showing good cause why respondent should not be suspended. The court may permit respondent to present oral argument in support of the respondent's response and shall promptly grant or deny the motion. If the motion is granted, the lawyer shall be suspended as of the date of such order.

C. *Reinstatement*. If a lawyer suspended solely under the provisions of sections (A) or (B) demonstrates that the underlying conviction has been reversed or vacated, the order for interim suspension shall be vacated and the lawyer placed on active status. The vacating of the interim suspension will not automatically terminate any proceeding then pending against the lawyer, the disposition of which shall be determined on the basis of the available evidence.

~~2. (f) *All Other Grounds*~~ **Procedure for Interim Suspension for all other grounds.** ~~The state bar may file a motion for interim suspension with the presiding disciplinary judge. The motion shall be accompanied by verification or separate affidavit upon personal knowledge stating sufficient facts to support the requested suspension, and shall include a copy of any related hearing panel report.~~ Pursuant to this rule, upon receiving a report and recommendation of the presiding disciplinary judge or a request for review of a decision of the presiding disciplinary judge, this court may issue an order of interim suspension. If a complaint against the lawyer is not yet pending when the court enters an order of interim suspension of that lawyer, the state bar shall expeditiously file a complaint against the lawyer as provided by these rules.

1. Immediate Suspension or Temporary Conditions of Probation or Both by Temporary Restraining Order of the Presiding Disciplinary Judge. When it is believed by the state bar that a lawyer should be immediately suspended or placed under immediate terms of probation or both, the state bar shall file an application for an order to show cause with the presiding disciplinary judge. The application shall be supported by affidavit showing reasonable cause that the alleged conduct has in fact occurred and that immediate relief should be granted.

A. If good cause is shown, the presiding disciplinary judge shall issue an order requiring the lawyer to show cause why the lawyer should not be immediately suspended or placed under immediate terms of probation or both.

- B. Any order to show cause shall be immediately served by the state bar on the lawyer pursuant to these Rules.
- C. After the issuance of an order to show cause, and regardless of whether a response has been filed, the presiding disciplinary judge shall hold a hearing on the petition within ten calendar days. That hearing may be a scheduling hearing or an evidentiary hearing or both. Any evidence received which would be admissible becomes part of the record and need not be repeated at any future hearing. In the event a complaint has not been filed regarding the allegations contained in the petition, the presiding disciplinary judge shall inquire of the state bar of the status and anticipated filing date of a complaint and shall weigh delay as a factor in considering whether to grant an immediate suspension. After a hearing on the merits with notice to the lawyer, the presiding disciplinary judge shall issue and file a report in this court within ten days.
- D. A temporary restraining order may be granted without written or oral notice to the lawyer only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result before the lawyer can be heard in opposition, and (2) the state bar certifies to the presiding disciplinary judge in writing the efforts, if any, which have been made to give notice or the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the disciplinary clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the presiding disciplinary judge fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the lawyer against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the petition for a temporary restraining order shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character, and when the motion comes on for hearing the state bar shall proceed with the petition for temporary restraining order and, if the state bar does not do so, the presiding disciplinary judge shall dissolve the temporary restraining order. On 2 days' notice or on such shorter notice to the state bar as the presiding disciplinary judge may prescribe, the lawyer may appear and move its dissolution or modification and in that event the presiding disciplinary judge shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

- E. In the event a temporary restraining order is granted, the presiding disciplinary judge may upon request or its own motion conduct a status conference regarding any restraining order issued until such time as this court rules upon the report and recommendation. If a written agreement by the parties is reached and filed with the presiding disciplinary judge before the ruling of this court, the presiding disciplinary judge may with or without hearing, accept, reject or recommend the agreement be modified. The presiding disciplinary judge may modify or vacate the temporary restraining order at any status conference provided any prior report and recommendation is amended setting forth reasons for such change.
- F. An immediate suspension by temporary restraining order or temporary conditions of probation or both shall be effective when entered by the presiding disciplinary judge unless otherwise specified, and shall continue in force until final disposition of all pending proceedings against the lawyer, unless vacated or modified by the presiding disciplinary judge or this court.
- G. Unless otherwise ordered for substantial good cause by the presiding disciplinary judge, an immediate suspension by temporary restraining order shall preclude the lawyer from accepting any new cases but shall not preclude the continued representation of existing clients until final order of this court. Unless otherwise ordered for substantial good cause by the presiding disciplinary judge, such immediate suspension shall not require the lawyer to notify clients or the courts of such immediate suspension until final order of this court.
- H. Any order or report issued under this rule by the presiding disciplinary judge shall contain findings of fact and conclusions of law and shall be reviewable by this court as follows:
- (1) In the event immediate suspension is granted or recommended, the presiding disciplinary judge shall file a report and order with recommendation in this court. After receipt of the report the court shall consider the matter and issue an order or decision forthwith.
 - (2) In the event an immediate suspension is not granted or recommended by the presiding disciplinary judge under this rule and regardless of whether temporary conditions of probation have been entered, either party may seek review of the order or report of the presiding disciplinary judge pursuant to Rule 59.

- I. If the bar files an affidavit stating that the lawyer against whom the temporary restraining order was issued is guilty of disobeying that order and describes by petition the acts constituting such disobedience and supports them by affidavit, the presiding disciplinary judge may order the lawyer to show cause why such lawyer should not be adjudged in contempt. Such order, with a copy of the petition and affidavit, shall be served upon the lawyer charged with the contempt within sufficient time to enable that person to prepare and make return to the order.

~~(d)~~(g)Effect of Order of Interim Suspension by the Court. ~~An order of interim suspension or decision on the motion~~ shall be effective when entered unless otherwise specified by the court, and shall continue in force until final disposition of all pending proceedings against the lawyer, unless vacated or modified. The clerk of the court shall serve a copy of any resulting order entered in this court on the disciplinary clerk, the respondent, and the state bar. An order of interim suspension shall preclude the lawyer from accepting any new cases but shall not preclude him or her from continuing to represent existing clients until the effective date of the order. Any fees tendered to the lawyer after the order issues but prior to its effective date shall be deposited in a trust fund from which withdrawals may be made only in accordance with restrictions imposed by the court. Any order that restricts a lawyer maintaining a trust account shall when served on any bank maintaining an account against which the lawyer may make withdrawals, serve as an injunction to prevent the bank from making further payment from the account or accounts on any obligation except in accordance with restrictions imposed by the court. Unless otherwise specified by the court, the provisions of Rule 72 relating to suspended lawyers shall apply.

~~A. Temporary Restraining Order. Upon verified application in or with the motion, or upon its own motion, the presiding disciplinary judge may issue an order in the nature of a temporary restraining order, with such notice as the judge may prescribe, imposing temporary conditions of probation on the lawyer, or temporarily suspending the lawyer, or both. Any order issued under this provision shall become effective as ordered by the presiding disciplinary judge and remain in effect unless modified or dissolved, as necessary, after a hearing as prescribed in subpart D.~~

~~B. Service of Motion on Respondent. Upon filing of the motion, the presiding disciplinary judge shall issue an order requiring the state bar to serve, within seven (7) days, the motion and the presiding disciplinary judge's order upon respondent, as appropriate under Rule 47(c), including service by certified mail/delivery restricted to addressee in addition to regular first class mail, sent to the last address provided by respondent to the state bar's membership records department pursuant to Rule 32(c)(3).~~

~~C. Response. Respondent shall file a response to the motion within ten (10) days of service of the motion. After receiving the response or after the time for filing a response has passed, the presiding disciplinary judge shall promptly rule on the motion or conduct an evidentiary hearing.~~

~~D. Hearing. If an evidentiary hearing is ordered, it shall be held within ten (10) days of the order. Within five (5) days after the matter is deemed submitted or a hearing is held, the presiding disciplinary judge shall issue and file a report in this court containing findings of fact,~~

~~conclusions of law and a recommendation. After receiving the presiding disciplinary judge's report, the court shall consider the matter and issue an order or decision forthwith.~~